Issues: Group II Written Notice (failure to follow instructions and unsatisfactory performance), another Group II Written Notice (failure to follow instructions and unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 06/15/17; Decision Issued: 07/05/17; Agency: DSS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 11014; Outcome: Full Relief; **Administrative Review: Ruling Request received 07/17/17; EEDR Ruling No. 2018-4588 issued 08/16/17; Outcome: Remanded for Clarification; Reconsideration Request on 08/16/17 ruling received 08/21/17; EEDR Ruling No. 2018-4610 issued 08/25/17; Outcome: Request to modify denied, original ruling affirmed; Remand Decision issued 09/05/17; Outcome: One Group II reduced to Group I, other Group II and Termination rescinded; Administrative Review: Ruling Request on 09/05/17 Remand Decision received 09/20/17; EEDR Ruling No. 2018-4620 issued 10/17/17; Outcome: Remanded again; Second Remand Decision issued 10/19/17; Outcome: Both Group II Written Notices reinstituted and Termination Upheld; Judicial Review: Appealed to Richmond Circuit Court (10/15/17); Outcome: AHO's decision affirmed (02/27/28) [CL17-5343-3].**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11014

Hearing Date: June 15, 2017
Decision Issued: July 5, 2017

PROCEDURAL HISTORY

Grievant is a manager with the Dept. of Social Services (the Agency). On both dates, March 16, 2017, and on March 30, 2017, the Agency issued to the Grievant a Group II Written Notice, for failure to follow supervisor's instructions and unsatisfactory work performance. With the second Written Notice, the Agency terminated the Grievant's employment.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On April 27, 2017, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (EEDR), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for June 15, 2017, on which date the grievance hearing was held, at the Agency's designated location.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. The parties were invited to submit, post-hearing, citations or authority regarding the application of Policy 1.40, *Performance Planning and Evaluation*, on the facts and circumstances of this grievance. The Agency, by counsel, submitted a policy interpretation from DHRM, issued June 23, 2017. The Grievant, by counsel, submitted further written argument in response, but noted this case is viewed as one of first impression. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through her grievance filings and presentation, the Grievant requested rescission of the Written Notices, reinstatement, restoration of benefits, back pay and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of

> employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The State Standards of Conduct, DHRM Policy 1.60, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 7. Failure to follow instructions and repeated instances of poor job performance specifically are considered Group II offenses. *Id*.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as a manager, with a long tenure at the Agency. On March 16, 2017, the Agency issued the Grievant a Group II Written Notice for the following offense:

> Employee is receiving a Group II – Written Notice under the Standards of Conduct for failure to follow supervisor's instructions and unsatisfactory performance as identified in the attached notice of intent. The employee is not completing the assigned tasks in the reevaluation plan which was established and implemented on 1/25/17 as required by policy due to the employee receiving an overall below contributor rating on the annual performance evaluation. Expectations have been clearly communicated however; the employee has not followed through with meeting deadlines and performing the assigned task.

Agency Exh. 1. The attached notice of intent included the following:

You have not met multiple expectations and assignments since receiving your re-evaluation plan which was effective January 25, 2017, including producing a report of unclaimed property processing, sending daily summary of Account 70 (unidentified payments) processed, as well as processing revenue refund voucher requests. You have also indicated an unwillingness to perform other tasks assigned. As documented in the March 3, 2017 reevaluation plan update, during our bi-weekly re-evaluation update meeting on that date, you indicated you had no intention of performing certain tasks included above, citing your belief that you are being asked to perform two full time jobs, stating "Account 70 is all I can and will do".

As I have mentioned to you on several occasions, both verbally and in writing, providing the daily/weekly information is key to assess work volumes/needs and should take a minimum amount of time each day. You were issued a Notice of Improvement Needed document on June 29, 2016. One of the items assigned to you in the Improvement Plan was to provide the Unclaimed Property reporting, a task that you did not complete. This contributed to the overall below contributor rating on your 2015-16 performance evaluation. This task was assigned again as part of your 3-month re-evaluation plan. To date, you not have completed the reporting. Failure to complete this and other assignments contributes to unnecessarily high undistributed collections totals for DCSE district offices (a key performance standard) and untimely processing of these and other vendor refund due to customers.

On March 30, 2017, the Agency issued the Grievant a second Group II Written Notice for the following offense, with termination of employment:

Employee is receiving a Group II – Written Notice under the Standards of Conduct for failure to follow supervisor's instructions and unsatisfactory performance as identified in the attached notice of intent. The employee did not complete multiple assigned tasks in the reevaluation plan which was established and implemented on 1/25/17 as required by policy due to the employee receiving an overall below contributor rating on the annual performance evaluation. Employee received a Written Notice on 3/17/17 and was provided an additional opportunity to provide the requested reporting. Progress expectations were clearly communicated however; the employee has not followed through with meeting deadlines and performing the assigned tasks.

Agency Exh. 2. Although the reference to the first Written Notice states the date 3/17/17, the Written Notice is dated 3/16/17. The attached notice of intent included the following:

You have not met multiple expectations and assignments since receiving your re-evaluation plan which was effective January 25, 2017, including producing a report of unclaimed property processing, sending daily summary of Account 70 (unidentified payments) processed, as well as processing Revenue Refund Voucher requests. You have also indicated an unwillingness to perform other tasks assigned. As documented in the March 17, 2017 reevaluation plan update, after receiving a Group II-Written Notice on March 16, 2017, you were given timelines to make specific progress on the items referenced above no later than March 23, 2017. As of the close of business March 23, 2017 you did not meet those expectations.

You did make an effort by providing a handwritten summary on the print out of your daily Account 70 work on one day (March 20). However, you have not followed up on the matter since the feedback I provided to you the next morning and have not provided any additional reporting. In addition, you did not meet the expectation of completing 33% or 19 Revenue Refund Vouchers by March 23, 2017; I have not received any from you or otherwise seen any completed. Finally, you have not provided the required Unclaimed Property reporting requested of you, with a revised due date of March 23, 2017.

As referenced in the Written Notices, the Grievant was placed under a re-evaluation plan with a stated effective date of January 19, 2017,[1] following an overall below contributor rating on her annual performance evaluation. Agency Exh. 6. The re-evaluation plan is under the requirements of Policy 1.40, *Performance Planning and Evaluation*. As part of the process, the Grievant's supervisor issued a memorandum to the Grievant on January 19, 2017, stating, among other things:

> In accordance with DHRM Policy 1.40, you will receive a final re-evaluation approximately two weeks prior to the end of the period (on or about April 10, 2017).
>
> I will provide feedback to you every 2 to 3 weeks, during this period to update you on your progress and address any concerns. It is imperative that your performance improve during this time to avoid further actions which may include demotion, reassignment, *or termination at the end of the 3 month period*.

Agency Exh. 7. (Emphasis added.)

The supervisor testified consistently with the allegations in the Written Notices, and his testimony credibly establishes the Grievant's pattern of poor work performance as the basis for the below contributor annual evaluation and during the 3-month re-evaluation plan. The supervisor documented ongoing concerns periodically on the actual re-evaluation plan, as promised in his January 19, 2017, memorandum to the Grievant. Agency Exh. 8.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. Policy 1.60, *Standards of Conduct*, states that employees are expected to meet or exceed established job performance expectations. Unsatisfactory work performance is an explicit example of a Group I offense. Agency Exh. 12. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

Policy 1.40 states, "The re-evaluation process does not prevent the agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in Policy 1.60, *Standards of Conduct*, or issuing additional Improvement Needed/Substandard Performance forms." Policy 1.40 also states that "[i]f the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated." The policy further states:

[1] The Plan has a handwritten notation that the Grievant refused to sign the plan on January 25, 2017, the effective date referenced in the Written Notices.

> An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period.

Agency Exh. 12. (Emphasis in original.) Policy 1.40 also provides:

> If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.

The question presented in this grievance is whether the Agency may switch to the written notice discipline, with early termination, for the same performance issues for which it committed to the 3-month re-evaluation plan. I find that, under the circumstances presented in this grievance, the Agency prematurely and improperly ended the re-evaluation plan by issuing two Group II Written Notices and an early termination based on the claimant's lack of improvement under the re-evaluation plan. I find that DHRM's policy interpretation, issued June 23, 2017, submitted by the Agency post-hearing, is not instructive for the unique circumstances presented in this grievance.

These policies, 1.40 and 1.60, must be read and interpreted in harmony. The absurdity doctrine is a tool of statutory construction employed in rare circumstances involving fundamentally flawed legislative drafting. The doctrine is implicated only if adopting the plain language of a statute would result in absurdity. *See Cook v. Commonwealth*, 268 Va. 111, 116, 597 S.E.2d 84, 87 (2004). If an absurd result would occur, the court replaces the literal meaning of the statute's plain language with a construction avoiding such absurdity. *See, e.g., Baker v. Wise*, 57 Va. (16 Gratt.) 139, 214-15 (1861). I find the same approach is appropriate in construing sister policies.

Because of the absurdity doctrine's potential to enable the judicial branch to appropriate the Commonwealth's legislative power, which is constitutionally vested in the General Assembly, Va. Const. art. IV, § 1, the Supreme Court of Virginia prohibits courts from exploiting that doctrine as a back door to impose their own policy preferences upon duly enacted statutes. To this end, the Court recognizes absurdity in only two narrowly defined situations: when "the law would be internally inconsistent," and when the law would be "otherwise incapable of operation." *Lucas v. Woody*, 287 Va. 354, 756 S.E.2d 447 (2014), citing *Covel v. Town of Vienna*, 280 Va. 151, 158, 694 S.E.2d 609, 614 (2010). A related doctrine, although not directly arising from absurdity, requires that when the plain language of multiple statutes conflict, the Court construes those statutes in harmony. *Lucas, supra*, citing *Boynton v. Kilgore*, 271 Va. 220, 228-29 & n.11, 623 S.E.2d 922, 926-27 & n.11 (2006). Under the doctrine of *pari materia*, courts should read and interpret statutes in harmony with related statutes. *DMV v. Wallace*, 29 Va. App. 228, 233-34, 511 S.E.2d 423, 425 (1999). I find that the two policies, 1.40

and 1.60, under a reasonable application of judicial interpretation used by courts of Virginia, must be read in harmony.

The Agency elected which path to take—either Policy 1.40 or Policy 1.60—to address the Grievant's poor work performance. It chose the framework within Policy 1.40, following the annual performance evaluation resulting in an overall below contributor rating. The Agency explicitly placed the Grievant under a 3-month re-evaluation plan, after which the Agency could have exercised options, including termination for the Grievant's lack of sufficient improvement. Instead, the Agency, departing to the parallel track of Policy 1.60, opted to issue two consecutive Group II Written Notices and termination for the Grievant's lack of improvement before the end of the 3-month re-evaluation period. Of particular importance, the written notices were based on the re-evaluation plan, as readdressed by management and noted within the re-evaluation plan that had not run its course.

A harmonious interpretation of Policy 1.40, specifically stating that the re-evaluation plan does not prevent disciplinary action under Policy 1.60, means that the re-evaluation plan does not insulate the employee from discipline based on any number of other misconduct, including other aspects of unsatisfactory performance. Here, the written notices are based specifically on the re-evaluation plan itself, as readdressed by management during the re-evaluation process, using the re-evaluation plan itself as its tool for documenting the lack of improvement. Agency Exh. 8. The Agency could have, of course, imposed discipline for other misconduct of poor performance, or even related offenses, such as insubordination, disruptive behavior, etc. The Agency offered no explanation for the change of course, unilaterally abandoning the re-evaluation plan, other than that the Grievant was not improving performance as the Agency was requiring through the re-evaluation plan. The Agency used the re-evaluation plan itself to document the claimant's continuing lack of improvement that served as the bases for the two written notices. Absent compelling circumstances beyond the poor performance being addressed by the re-evaluation plan, early termination under Policy 1.60 is irreconcilable with the 3-month re-evaluation plan under Policy 1.40.

If failing to improve adequately under a re-evaluation plan is ground for a written notice, particularly with termination, it renders the purpose of the re-evaluation plan meaningless and, therefore, an absurdity. Construing Policies 1.40 and 1.60 inharmoniously, an agency could issue a written notice each day of a re-evaluation plan that an employee has not sufficiently improved. For example, if one Group I written notice was issued on each of days 1 through 4 of the re-evaluation plan, based on poor work performance addressed by the re-evaluation plan, then the 3-month re-evaluation plan could be aborted with employee termination after 4 days (accumulation of 4 Group I Written Notices). That would be an inharmonious, if not absurd, result. Policy 1.40 specifically anticipates that a transfer, demotion or reassignment during the re-evaluation period would end the re-evaluation period. In this case, the Agency committed to a 3-month re-evaluation plan, and the Grievant was on a documented path of continued poor performance. The plan explicitly put the Grievant on notice that her unsatisfactory work performance could result in "*termination at the end of the 3 month period*." Agency Exh. 7. (Emphasis added.) Under this analysis, I find that agency management has not acted in accordance with law and policy.

Because there is insufficient explanation for electing the parallel disciplinary process for the same conduct subject to the re-evaluation plan, the reasonable conclusion is that the Agency acted from an improper motivation. The Grievant argues that the Agency's motive is retaliation for her prior grievances, one of which resulted in a finding of retaliation by the Agency. Grievant Exh. 7. In the absence of any other explanation for why the Agency concurrently imposed its correction power through two punitive processes, either one of which could have resulted in an orderly termination (if supported by the evidence), the reasonable inference is that the Agency improperly retaliated against this Grievant by its disciplinary process imposed to end prematurely the re-evaluation period with termination.

DECISION

Accordingly, I rescind the two Written Notices and reverse the discipline, including termination. The Grievant is reinstated to her former or equivalent position, with restoration of back pay, and other benefits, to be offset by any interim earnings, including unemployment compensation. In accord with this decision, the Agency is ordered to complete the re-evaluation plan as originally implemented.

ALTERNATIVE ANALYSIS and CONCLUSION

As an alternative analysis, should the analysis and decision, *supra*, be reversed, with direction to consider valid the issuance of two written notices under the facts and circumstances of this grievance, I further find that the Agency overreached on the level of severity for the written notices. Policy 1.60, in the attachment, specifies that poor work performance is a Group I offense. Agency Exh. 12. Perhaps a second written notice for the same offense could be heightened to a Group II offense, but this was not how the Agency approached the situation.

The supervisor testified consistently with the allegations in the Written Notices, and his testimony credibly establishes the Grievant's pattern of poor work performance.

The Grievant testified that she did not have a good relationship with her supervisor, and that her prior grievances had caused the Agency to retaliate against her, as held in a grievance decision issued February 3, 2017 (Case No. 10891). Grievant's Exh. 7. The Grievant testified that, despite being a long-term manager at the Agency, she was unfamiliar with the reports she was expected to produce and the work assignments she was assigned. She testified that the work load was excessive, and she believed the present discipline unduly singled her out and was an act of retaliation for her prior grievance, a protected activity.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g.*, Rules for Conducting Grievance Hearings, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EEDR's *Rules for Conducting Grievance Hearings* (*Rules*) provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A). More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

Based on the manner, tone, and demeanor of the testifying supervisor, I find that he has reasonably described a behavior concern that he, as the supervisor, is positioned to address. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Written Notices. However, I find that the offense is in essence for unsatisfactory or poor work performance (even if the supervisor's instructions were to improve her performance). (Policy 1.60, in writing, directs employees to "meet or exceed established job performance expectations," but that does not convert an offense of unsatisfactory work performance to a Group II offense of failure to follow supervisor's instructions or comply with written policy.) Thus, the appropriate level for a first offense of unsatisfactory work performance is a Group I Written Notice. Under Policy 1.60, the second Written Notice, given the repeat nature of the unsatisfactory work performance, may, in the Agency's discretion, be considered a Group II offense. While failure to follow supervisor's instructions is a policy designated Group II offense, in this case the supervisor's instructions cannot be separated from the unsatisfactory work performance that is referenced explicitly in each Written Notice.

Because the correct offense levels are appropriately a Group I Written Notice (for the 3/16/17 Written Notice) and a Group II Written Notice (for the 3/30/17 Written Notice), termination is not supported by this disciplinary record.

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Here, a first Written Notice for unsatisfactory work performance should be a Group I Written Notice in accord with policy. Thus, the Agency has borne its burden of proving the offending behavior, the behavior was misconduct, but the appropriate level of the first Written Notice is a Group I. The second Written Notice for unsatisfactory work performance may appropriately be a Group II, heightened because of the repeat nature. Accordingly, with a Group I and a Group II Written Notice, termination is inappropriate on this disciplinary record and is, therefore, reversed.

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EEDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the Rules requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the Rules "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling No. 2010-2483 (March 2, 2010) (citations omitted). EEDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling No. 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its obligation and need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for its mission to the affected community. The Grievant's position placed her in a responsible role, and the Grievant's conduct as documented by the Agency was contrary to the Agency's expectations. I find that the Agency has demonstrated a legitimate business reason and acted within the bounds of reason in its discipline for poor work performance.

Issuance of Written Notices for poor work performance during a re-evaluation plan is arguably a harsh result, but, if the primary analysis and decision, above, is reversed, the Agency has demonstrated the continued poor performance during the re-evaluation plan period. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, a hearing officer may not substitute his judgment for that of Agency management. I find no mitigating circumstances that render the Agency's action of issuing two Written Notices outside the bounds of reasonableness for documented poor work performance. The conduct as stated in the written notices occurred.

Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by exercising her grievance rights culminating in the hearing officer's decision issued July 5, 2016. Grievant Exh. 7. The Grievant asserts that the retaliation she has experienced stems from this prior grievance process, plus the Grievant's appeal of the qualification ruling finding that her grievance of her performance evaluation was not qualified for a hearing. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and suspension. I have found that the Agency's act of superimposing the Policy 1.60 disciplinary process over the Policy 1.40 re-evaluation plan was a retaliatory action. However, the Grievant does not satisfy the burden of proof of showing that the Agency's assessment of the Grievant's work performance was retaliatory.

There is nothing to suggest that the Agency's view of the claimant's work performance was retaliatory beyond the Agency's procedural actions to speed to termination via the disciplinary process rather than the existing re-evaluation plan. The Agency has addressed a noticeable performance deficiency. Grievant has not presented sufficient evidence to show that the Agency's evaluation of the Grievant's performance was motivated by improper factors. Rather, the Agency's assessment of poor performance appears based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

ALTERNATIVE DECISION

For the reasons stated herein, as an alternative finding, I uphold the Agency's discipline as modified to a Group I Written notice issued 3/16/17 and a Group II Written Notice issued 3/30/17. Because the disciplinary record does not support termination, the Grievant is reinstated to her former or equivalent position, with restoration of back pay, and other benefits, to be offset by any interim earnings, including unemployment compensation. In accord with this decision, the Agency is ordered to complete the re-evaluation plan as originally implemented.

ATTORNEY'S FEES

Relief of reinstatement in a discharge grievance allows for the Grievant to recover reasonable attorney's fees. Counsel for the Grievant shall ensure that the Hearing Officer receives within 15 days of the issuance of this decision counsel's petition for reasonable attorney's fees. The fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed the amounts provided on EEDR's website. A copy of the fees petition must be provided to the Agency at the time it is submitted to the Hearing Officer. The Agency may contest the fees petition by providing a written rebuttal to the Hearing Officer.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.[2]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

Cecil H. Creasey, Jr.
Hearing Officer

2 Agencies must request and receive prior approval from EEDR before filing a notice of appeal.